UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants,

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

PLAINTIFFS' RESPONSE TO THE LEGISLATURE'S ASSERTION IT IS UNABLE TO AMEND ACT 43

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Yesterday morning, the Court asked counsel for the plaintiffs and defendants to "engage in meaningful dialogue" regarding "how best to proceed with regard to achieving that which every citizen, without regard to party affiliation, without regard to politics, ought to achieve, and that is a fair, just and meaningful redistricting plan." Feb. 21, 2012 Transcript Volume I ("Trans. Vol. I") at 12. Yesterday evening, the Court heard counsel for both parties express a willingness, on behalf of the legislative leadership from each side of the political aisle, to try to resolve the historic issues raised in this case without the need for a full trial on the merits of Acts 43 and 44. As the Court noted, there is a strong preference to work out these issues, in the legislature, not the courts, if possible.

There is no reason for the Court not to accept the representations of the legislature. In the interests of justice and fairness, the Court should stay the trial until March 2012 to permit the legislature to try to accomplish now what it could not last summer. The Government Accountability Board, above all parties, should want that result, but its counsel has expressed a

different perspective, reaching back more than 50 years to find an "impediment" in a distinguishable case.

I. THERE IS NO LEGAL IMPEDIMENT BARRING THE LEGISLATURE FROM TAKING ACTION WITH REGARD TO ACT 43.

Based on the representations of GAB's counsel, the only obstacle to the legislature moving forward with a meaningful dialogue regarding Act 43 is a lawyer's interpretation of one case. Feb. 21, 2012 Transcript Volume II ("Trans. Vol. II") at 30-31. GAB's counsel raised this issue late yesterday afternoon, stating that Article IV, section 3 of the Wisconsin Constitution and case law bar the legislature from considering or implementing corrective legislation for Act 43, relying solely on *State ex. rel. Smith v. Zimmerman*, 266 Wis. 307, 63 N.W.2d 52 (1954). *See* Trans. Vol. II at 26-27. According to defendants' counsel, this Gordian knot cannot be cut. A closer reading of the case law and its context demonstrates otherwise. *Zimmerman* is not a reason to refuse negotiation, it is an excuse.

It may be easiest to begin with a negative: *State ex rel. Smith v. Zimmerman* is not about the legislature's ability to revisit a redistricting bill to settle significant claims as to its validity.[1] *Smith* does not preclude the legislature from amending Act 43 to ensure that its alleged infirmities are cured—as they should be—by the legislature.

The Wisconsin Constitution does not explicitly bar the legislature from revisiting a redistricting bill. Article IV, section 3, is an affirmative mandate that the legislature reapportion

[1] The backdrop of *Zimmerman* is distinguishable as well. In July 1950, the Wisconsin Legislative Council created a reapportionment committee consisting of 2 senators, 3 representatives, and 3 public members. *See* Ex. 1 (Wis. Leg. Ref. Bureau, Wisconsin Redistricting Criteria (Informational Memorandum 10-4 July 2010)). The committee became known as the "Rosenberry Committee" after its chairperson, Marvin B. Rosenberry, a former chief justice of the Wisconsin Supreme Court. The committee's recommendations were submitted to the 1951 legislature (holding biennial sessions beginning in odd-numbered year since 1881) and formed the basis of the legislative redistricting plan adopted by the 1951 legislature. Chapter 728, Laws of 1951, the "Rosenberry Act," represented the first full statewide reapportionment since 1921. Long before *Baker v. Carr*, it was based solely on the premise of making legislative districts as equal in population as possible. *Id.*

its districts "[a]t their first session after each" census. The Wisconsin Supreme Court has construed this provision to mean that "no more than one valid apportionment may be made in the period between the federal enumerations." *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

That holding is limited to *valid* apportionments and to the "first session" post-census. In *Smith*, there was "no claim . . . that the . . . apportionment in 1951 did not comply with all constitutional demands." 266 Wis. at 313. Here, there is. Defendants contend that the claim is not enough—they hypothesize that a frivolous claim could be collusively filed to allow evasion of the constitutional limitation. Clearly, collusive filing is not a concern here, and, in any event, the *Smith* Court disagrees with the defendants' hypothesis: it was only "[i]n the absence of a successful attack upon its constitutionality (not attempted here)" that the reapportionment had "passed beyond the legislature's power of revision" 266 Wis. at 314. Moreover, this Court has left no doubt about the seriousness of the plaintiffs' claims, although, as the Court has endeavored to remind the parties, they remain only claims at this point.

The constitutional mandate is to reapportion the legislature "the first session" after each census. That session remains open until "12 noon on January 7, 2013," and no elections have been held in the Act 43 districts. To the contrary, all special and recall elections have been held under the boundaries established by this Court in 2002. In *Smith*, by contrast, the legislature had "adjourned" and "the citizens of the state by their action in the referendum brought to pass the condition upon which the finality of the Rosenberry apportionment depended"—*i.e.*, they elected new legislators to represent them in the new districts. *Smith*, 266 Wis. at 313.

If the finality of Act 43 depends, as *Smith* suggests, on an election under its mandate, there is no bar to revisiting it until November 2012. Indeed, *Smith* explicitly characterized "the

date of the referendum" as the "very latest" date beyond which the reapportionment had "passed beyond the legislature's power of revision"—and the Court declined to rule "whether it so passed at an earlier date." *Id.* at 314. Far from barring the legislature from acting, this case permits it.

The *Smith* Court, quoting *State ex rel. Hicks v. Stevens*, 112 Wis. 170 (1901), characterized the once-per-census limitation as a means of curbing reapportionment abuse: "If new counties may be created and the apportionment rearranged and readjusted to suit legislative whims, the power might be subject to abuse, and the real purpose of the restrictions defeated." *Smith*, 266 Wis. at 318. Revisiting Act 43 at the urging of a three-judge federal court hardly suits "legislative whims" and will not open the door to abuse.

II. THE LEGISLATURE HAS THE CAPABILITY TO AMEND ACT 43.

The legislature has expressed a willingness to amend Act 43, and all of the interested parties have indicated that this is a readily achievable course of action. Until yesterday, there had been no suggestion that the legislature does not possess the ability to do so. Indeed, even before the enactment of Act 43, legislative staffers responsible for drafting the plan envisioned the possibility of amendment, stating "[t]his is a placeholder map. If the Senate comes back in the majority, we *may* come back and adjust." *See* Ex. 2 (Pls.' Tr. Ex. 113 (Talking points memorandum prepared by legislative staffers Adam Foltz and Tad Ottman)) (emphasis in original). As early as July 25, 2011 (five days after Act 43's legislative approval), one of the legislature's counsel, Jim Troupis, suggested to legislative staffers Adam Foltz and Tad Ottman (along with Joseph Handrick, Eric McLeod, and Raymond Taffora) that "the alternative of simply redrawing within the area remains a real possibility," with regard to the newly created Latino districts. *See* Ex. 3 (Pls.' Tr. Ex. 210 (MBF 000259, 7/25/12 email from Jim Troupis)).

Three months after the enactment of Act 43, Senator Mary Lazich floated the idea of amending Act 43 to make it effective immediately (trying to ensure that any recall elections

would be conducted under the Act 43 boundaries) rather than adhering to the plain-language November 2012 statutory effective date of the boundaries. When asked if such a bill could be enacted, Lazich said: "The Legislature can move mountains when they need to or they can move like molasses in January." *See* Ex. 4 (*Wisconsin Republicans Eye Change to Recall Law*, Talking Points Memo (Oct. 27, 2011)).

Four months after the enactment of Act 43, GAB itself stated that corrective legislation can (and should) be enacted in response to the "anomalies" issue. *See* Ex. 5 (Dkt. 113) (Internal Government Accountability Board Memorandum from Sarah Whitt, SVRS Functional Lead, and Shane Falk, Staff Counsel to Nathaniel E. Robinson, Elections Division Administration, and Ross Hein, Elections Supervisor, regarding Census Blocks Conflicting with Municipal Boundaries (Nov. 10, 2011)). GAB stated that it would "[w]ork with the Legislature to develop legislation that will make necessary technical corrections to Acts 39, 43, and 44 to correct districts to properly reflect actual municipal boundaries rather than being strictly based on census blocks. The simplest way to accomplish this is to make technical corrections to the Acts to refer to the actual wards that comprise the districts, rather than referring to the census blocks." *Id.*

Six months after the enactment of Act 43, Kevin J. Kennedy, General Counsel for GAB and a defendant in this case, similarly stated in his deposition that because of the need to address the errors arising from Act 43's use of census blocks rather than wards in the redistricting process, the legislature (or a court) can change the dates, currently June 1, for candidates to file nomination papers with the agency. Deposition of Kevin J. Kennedy (Dkt. 144) at 96:20-97:1, 97:21-24. Doing so would alleviate any issues related to timing of elections that defendants may contend impedes the legislature from reaching a resolution. If the majority leadership of the

legislature truly is interested in negotiating a resolution to address the concerns identified by this Court, it has the power to change the timing of the nomination process to achieve that end.

It is noteworthy that never, until yesterday, had GAB's counsel pointed out the impediment it has now discovered. Moreover, the constitutional context of redistricting has changed dramatically since 1954. The law is now one person, one vote. Federal courts review redistricting laws for statutory and constitutional violations. Where necessary, they remand statutorily-enabled boundaries for judicial or legislative corrections. Indeed, this Court's own 2002 judgment, still valid, gives it the authority to compel what GAB's counsel wants to avoid: giving the legislative process a second chance, this time properly open to public input and scrutiny.

CONCLUSION

The legislature should endeavor to move mountains on behalf of the Wisconsin citizens they represent. Plaintiffs have raised serious questions about Act 43, not only as to its content but also as to the process by which it was adopted. The Court, recognizing the legal significance of those challenges, has invited the legislature to revisit the statute. The irony is that defendant GAB, after spending months emphasizing that redistricting is a function of the legislature, is now arguing against a legislative correction.

Perhaps the defendants want an assurance that it will never again face a redistricting challenge this decade. Such a guarantee is impossible no matter how this litigation concludes. Even if this Court holds Act 43 unconstitutional and sends the legislature back to the drawing board, it cannot guarantee that another plaintiff will not file suit challenging the legislature's own remedy. No court can.

However, this Court will retain continuing jurisdiction over any settlement—either to affirm its legality or to adjudicate any doubts—and can, plaintiffs assume, put a speedy end to

any further challenges once its validity is confirmed. Such assurance should be enough, plaintiffs would hope, to put most doubts to rest and allow a legislative solution to proceed apace. Redistricting *is* primarily a legislative function – as long as it is done openly and constitutionally. Not everyone gets a second chance. The legislature has one, and it needs one.

Dated: February 22, 2012.

GODFREY & KAHN, S.C.

By: */s/ Douglas M. Poland*

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Dated: February 22, 2012.

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7522524_1

EXHIBIT 1

Informational Memorandum from the Legislative Reference Bureau

Informational Memorandum 10–4 July 2010

Wisconsin Redistricting Chronology, 1950-2002

In Wisconsin, responsibility for redrawing legislative and congressional district lines rests with the legislature. The legislature is required to redraw legislative and congressional districts every 10 years based upon the results of the decennial federal census. Article IV of the Wisconsin Constitution contains the basic provisions concerning legislative redistricting. Under its provisions, the legislature is to be comprised of a senate and an assembly divided into single-member districts which are compact as practicable and consist of contiguous territory bounded by "county, precinct, town or ward lines". The legislature is directed to redistrict each house at the first session following the decennial federal census; establish from 54 to 100 assembly districts; draw senate districts which do not cross assembly boundaries and which comprise not more than one-third nor less than one-quarter of the number of assembly districts. There are no Wisconsin statutory or constitutional provisions specifically relating to the apportionment of the U.S. Congress. Congressional apportionment is based on Article I, Section 2 of the U.S. Constitution which provides that "Representatives ... shall be apportioned among the several states ... according to their respective numbers."

Although a legislative responsibility, the courts have been involved in legislative redistricting to some degree in each of the past 5 decades. In all cases, judicial intervention was the result of the legislature and the governor failing to agree on a plan to redraw legislative district boundaries. In contrast, the legislature has had comparatively little difficulty in enacting congressional redistricting plans, even in cases where the number of seats have been reduced due to relative population growth.

The following chronology summarizes legislative and judicial involvement in redistricting beginning with the 1950 decade which represented the first attempt to draw legislative districts on the one person, one vote principle. That principle became a national standard in the 1960's following a series of decisions by the U.S. Supreme which firmly established equal population as a basic tenet of state legislative redistricting.

The 1950s. The legislature redrew legislative districts following the 1950 census. In July 1950, the Legislative Council created a reapportionment committee consisting of 2 senators, 3 representatives, and 3 public members. The committee became known as the "Rosenberry Committee" after its chairperson, Marvin B. Rosenberry, a former chief justice of the Wisconsin Supreme Court. The committee's recommendations were submitted to the 1951 Legislature and formed the basis of the legislative redistricting plan adopted by the 1951 Legislature. Chapter 728, Laws of 1951, the "Rosenberry Act," represented the first full statewide reapportionment since 1921 and was based solely on the premise of making legislative districts as equal in population as possible. The constitutionality of the plan was upheld by the Wisconsin Supreme Court, and the plan, with several minor adjustments, served for the remainder of the decade. No changes in the boundaries of Wisconsin's 10 congressional districts were made during the decade.

The 1960s. Following the 1960 census, a Republican-controlled legislature and Democratic governors were unable to agree on a legislative redistricting plan during the 1961 and 1963 sessions. In 1964, the Wisconsin Supreme Court established the legislative districts which served for the remainder of the decade.

The legislature failed to redistrict legislative or congressional districts during the 1961 session. Meeting simultaneously in regular and special session in June 1962, the legislature considered 4 bills

Prepared by Larry Barish, Research Manager

Reference Desk: (608) 266-0341
Web Site: www.legis.state.wi.us/lrb

for congressional redistricting, 5 bills for legislative reapportionment, and 8 joint resolutions proposing amendments to the Wisconsin Constitution relating to reapportionment. Two congressional and one legislative bill passed but were vetoed by Governor Gaylord Nelson.

The 1963 Legislature again failed to enact a legislative plan which was acceptable to the governor. When Governor John Reynolds vetoed a legislative plan, the legislature proceeded to reenact the vetoed plan in the form of a joint resolution (1963 Senate Joint Resolution 74). The Wisconsin Supreme Court held that plan invalid because the governor was improperly excluded (*State ex rel. Reynolds v. Zimmerman,* 22 Wis. (2d) 544) and eventually promulgated its own "temporary" legislative redistricting plan in May 1964 (*State ex rel. Reynolds v. Zimmerman,* 23 Wis.. (2d) 606). The plan was used for the 1964 legislative elections and, in the absence of a legislatively-enacted plan, served for the remainder of the decade. A bill to redraw congressional districts was passed by the 1963 Legislature and was signed into law as Chapter 36, Laws of 1963.

The 1970s. The 1971 Legislature redistricted Wisconsin's 9 congressional districts (Chapter 133, Laws of 1971) and after several unsuccessful attempts and the threat of judicial action, eventually succeeded in enacting a legislative plan (Chapter 304, Laws of 1971).

Following the 1970 census, political control was again divided. The Democratic governor, Patrick Lucey, and a legislature which had a Republican majority in the Senate and Democratic majority in the Assembly, failed to adopt a plan. A 12-member commission of citizens and legislators appointed by the governor also failed to reach agreement. When the legislature recessed in March 1972 without agreeing on a legislative redistricting plan, a federal court suit was filed requesting the court to reapportion the legislature. In addition, Attorney General Robert Warren petitioned the Wisconsin Supreme Court to carry out the reapportionment. The Wisconsin Supreme Court set a deadline for the legislature to act before the act before the court would undertake the task of redrawing legislative districts. Acting in the shadow of this deadline and the threat of imminent court action, the legislature met in special session and passed a legislative plan which was signed by the governor (Chapter 304, Laws of 1971).

The 1980s. A Democratic-controlled legislature and a Republican governor were unable to agree on a legislative plan and a 3-judge federal panel in June 1982 promulgated a legislative redistricting plan (*AFL-CIO v. Elections Board,* 543 F. Supp. 630 (E.D. Wis. 1981))to govern the November 1982 elections to all 99 assembly districts and 17 of 33 senate districts. In July 1983, the court plan was superseded by the legislative redistricting enacted by the legislature and signed into law by Governor Earl (1983 Wisconsin Act 29). The 1981 Legislature adopted a congressional redistricting plan (Chapters 154 and 155, Laws of 1981) after an earlier plan was vetoed by Governor Lee Dreyfus.

The 1990s. Although both houses of the Legislature were controlled by Democrats, Republican Governor Tommy Thompson used his veto authority to reject a plan (1991 SB–578) passed by legislature. Subsequently, the U.S. District Court for the Western District of Wisconsin promulgated a legislative redistricting plan in June 2002 (*Prosser et al. v. Elections Board et al.,* 793 F. Supp. 859 (W.D. Wis. 1992)) that remained in effect for the remainder of the decade.

A congressional redistricting plan was enacted by the Legislature in 1991 Wisconsin Act 256.

The 2000s. With partisan control split in the two houses, there was little likelihood of agreement on a redistricting plan. Each house passed a plan but neither was acted upon by the other house. As a result, the federal district court was once again called upon to promulgate a plan and it did so in *Baumgart et al. v. Wendelberger et al.* (Case No. 01-C-0121, E.D. Wis.); revised order issued in July 2002.

Although Wisconsin's 2000 Census population resulted in the loss of a ninth congressional seat, the Legislature reached agreement on a 8-district congressional plan (2001 Wisconsin Act 46).

EXHIBIT 2

General Talking Points

- General Map Goals
  - Highest priority is achieving equal population
  - Must properly draw minority districts
    - "Minorities must be given the opportunity to elect the candidate of their choosing."
  - Compact and contiguous

- Timeline and process
  - 3 separate bills will be introduced
    - Congressional Map, Legislative Map, Process/Venue Change
  - Senate Plans to introduce the bill late next week
  - Floor action by the middle of the month
  - Assembly will wait and see for the legislative map
  - This is a placeholder map. If the Senate comes back in the majority, we *may* come back and adjust.
  - Public comments on this map may be different than what you hear in this room. Ignore the public comments.

- Confidentiality
  - Previously signed agreement applies to this meeting
  - Public comment will lead to depositions and being called to the witness stand

EXHIBIT 3

From: McLeod, Eric M (22257) [EMMcleod@michaelbest.com]

Sent: Friday, February 17, 2012 1:57 PM

To: Poland, Douglas

Cc: Daniel Kelly (dkelly@reinhartlaw.com); Patrick J. Hodan; Lazar, Maria S.; Scott Hassett (pshassett@yahoo.com); Shriner Jr., Thomas L.; James Olson; Peter G. Earle (peter@earle-law.com)

Subject: Attorney-client documents and attachments.

Attachments: Communications - # 11013284 v 1 (2).pdf

Doug,

In light of the Court's order of February 16, we have determined that in all but two instances, the attachments to the emails identified on the privilege log were previously produced in the prior document production from Mr. Ottman and Mr. Foltz. However, rather than identifying them in the prior production, I am going to re-produce all of the attachments now, so that it is clear what attachment goes with what email. I will be forwarding those attachments in successive email messages. Each email from me will separately include the attachment(s) from each email on the privilege log.

Also, after review of the Court's order, we realized that there are additional responsive email communications between counsel and Mr. Ottman and/or Mr. Foltz that were not in the actual possession of Mr. Ottman and/or Mr. Foltz, but which were in the possession of counsel. Thus, those email communications should, arguably, be produced. We did not include them previously in the privilege log as our focus was on identifying documents within the possession of Mr. Ottman and Mr. Foltz. However, in order to ensure that we are fully complying with the Court's order, we are producing those now. Those items are attached to this email.

EMM

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EXHIBIT
stobler
2/10

McLeod, Eric M (22257)

From: Jim Troupis [jrtroupis@troupislawoffice.com]
Sent: Monday, July 25, 2011 12:36 PM
To: Adam Foltz; tad ottman; joseph handrick; McLeod, Eric M (22257); Taffora, Raymond P (22244)
Subject: RE: In case you missed this

Interesting comments in that the 'process' still dominates. Also, we now can be certain what they are saying which is a major plus.
Notice the absence of the50% Senate district claim and the claim that we've left Latino's out. Thus, the alternative of simply redrawing within the area remains a real possibility.
Jim

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From: Adam Foltz [mailto:adamfoltz@gmail.com]
Sent: Monday, July 25, 2011 12:32 PM
To: tad ottman; joseph handrick; Eric McLeod; Taffora, Raymond P (22244); Jim Troupis
Subject: In case you missed this

http://www.jsonline.com/news/milwaukee/126095648.html

EXHIBIT 4

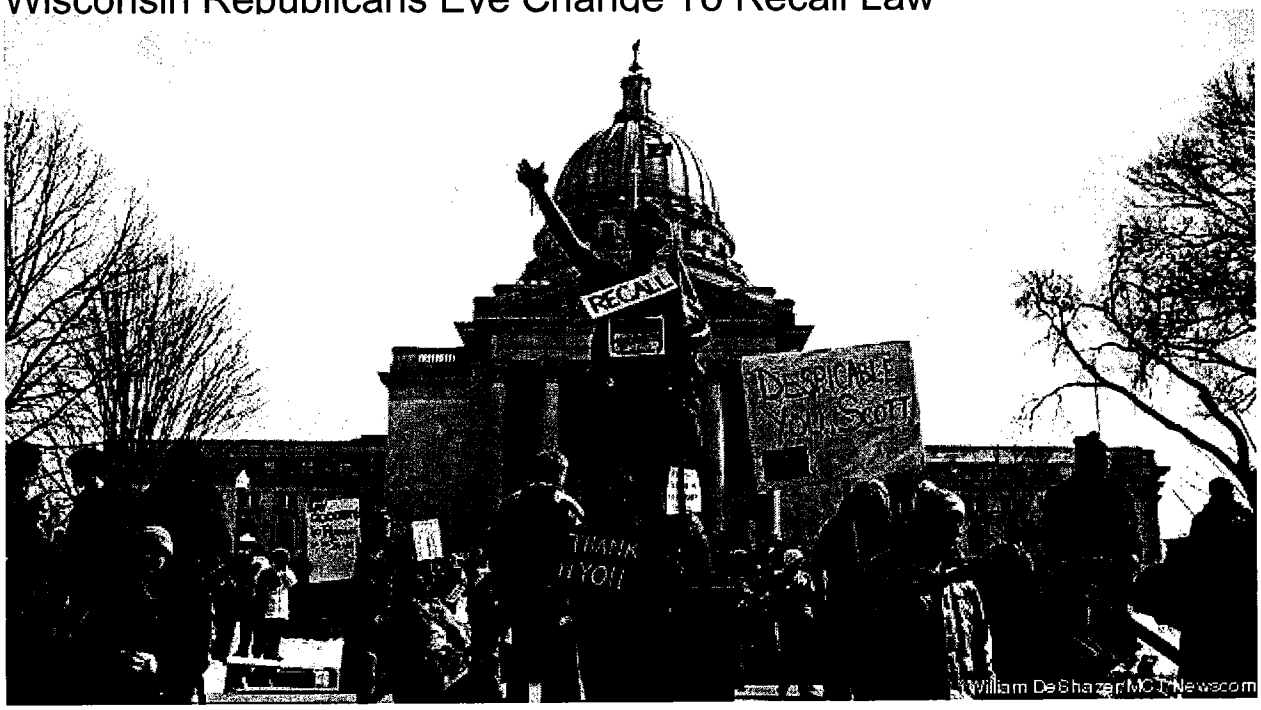
Anonymous Denies It Is Pursuing Power Outage Attacks

Arizona Sheriff Paul Babeu Wants His Ex-Boyfriend Investigated

Santorum Takes Climate Change Denial To A Biblical Level

TPMDC

Wisconsin Republicans Eye Change To Recall Law



ERIC KLEEFELD - OCTOBER 27, 2011, 11:40 AM

17530

There's new controversy in the push to recall Wisconsin Gov. Scott Walker: Which district maps will be used it, and for any further state Senate recalls.

Under Wisconsin's recall law, elected officials must have served at least one year of their current term before being recalled. And because half of the state Senate is up each two years, this exempted earlier this

year the half of the Senate that was just elected in 2010. However, with that ceiling now lifted going into next year, the state Dems are aiming to launch more state Senate recalls, in addition to their goal of recalling Walker.

The next wrinkle, then, is the fact that 2012 is a redistricting cycle — and the state Republicans, who gained control of both legislative chambers and the governorship in 2010, passed a very GOP-friendly redistricting map earlier this year.

The state Government Accountability Board, which oversees elections in the state, told lawmakers on Wednesday that further recalls would take place under the old districts — because the redistricting law was written in a way that it would take effect in Fall 2012 for election purposes, though at the same time it took effect immediately for constituent service purposes.

This has some Republicans looking at passing a new law, to have the map take effect immediately for election purposes, and thus for any further recalls.

In order to pass such a law, however, they would need total unity in the state Senate and its current 17-16 GOP majority, assuming that all Democrats would vote against it. A call by TPM to one key moderate swing vote, GOP state Sen. Dale Schultz, was not immediately returned.

On the one hand, holding the recalls under the old districts would mean that some legislators would be subject to recalls by voters that they would no longer represent. On the other hand, using the new districts would mean that recalls would include areas and voters who had not elected the legislators to their current terms.

"It's a double-edged sword, probably more than a doubled-edged sword, no matter how you cut this," Kennedy told the Associated Press. "We normally don't see recalls during redistricting years. This is an unusual time, this is unusual territory."

"I don't see a clear path to getting out of this mess other than clarifying these districts," state Sen. Mary Lazich (R) told the Milwaukee Journal Sentinel.

The paper reports:

Lazich said she supported changing the law so that the new districts would take effect right away, which would mean any recalls would have to be conducted in the revised districts. She said she would discuss the matter with Senate Republicans when they meet Thursday and decide after that whether to write a bill on the issue.

...

Any bill to change when the new districts take effect would have to move through quickly because recall petitions can be circulated for a new batch of lawmakers starting Nov. 4 - a week from now. Asked if she thought a bill could pass, Lazich said: "The Legislature can move mountains when they need to or they can move like molasses in January."

Wisconsin Democrats earlier this year, faced with a 19-14 Republican majority in the state Senate after the 2010 Republican wave, mounted a campaign against Gov. Scott Walker's anti-public employee union legislation by trying to recall their way to a majority. However, they were also hampered by the fact that the only recall-eligible districts were ones where the incumbent had won their terms in 2008, even during that year's Democratic wave.

In the end, Democrats were only able to pick up two seats, for a narrow 17-16 Republican majority. Out of the recall campaigns that were waged by both parties, four incumbent Republicans and three Democrats retained their seats, while two Republicans lost to Democratic challengers.
2012 elections, Recall, Wisconsin , Wisconsin Protests, Wisconsin Recalls, Wisconsin State Legislature

Eric Kleefeld

Follow @EricKleefeld

Eric Kleefeld joined TPM as an intern for the final months of the 2006 midterm elections, and then kept showing up for work. His other interests include guitars, old comic books and the politics of various English-speaking countries.

TPMLivewire

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Santorum Raises 'Over $6 Million' In

Tom Kludt
Publishing Intern
Christopher O'Driscoll
General Manager & General Counsel
Millet Israeli
VP, Ad Sales
Bruce Ellerstein
Waldo Tibbetts
Bob Edmunds
Manager, Ad Operations and Sales Support
Versha Sharma
Deputy Publisher
Callie Schweitzer
Director of Technology
Eric Buth
Designer/Developer
Ni Mu
Matthew Wozniak

EXHIBIT 5

EXHIBIT 3

State of Wisconsin \ Government Accountability Board

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MEMORANDUM

DATE: November 10, 2011

TO: Nathaniel E. Robinson
Elections Division Administrator
Government Accountability Board

Ross Hein
Elections Supervisor
Government Accountability Board

FROM: Sarah Whitt
SVRS Functional Lead
Government Accountability Board

Shane Falk
Staff Counsel
Government Accountability Board

SUBJECT: Census Blocks Conflicting with Municipal Boundaries

Through the conversations we have been having with local election officials, as well as state and local geographic information specialists, new issues have been brought to our attention that directly impact the Government Accountability Board's (G.A.B.) Redistricting Initiative. Several practical implementation concerns have arisen regarding census blocks conflicting with actual municipal boundaries. This memo provides a summary of the issues and a plan of action that addresses the issues.

Background

Every ten years, as part of the decennial Census, the U.S. Census Bureau collects demographic and geographic information from across the country and compiles the data for use by states, counties, and municipalities to draw new district lines. The census data is broken down by census blocks, which provide the basic building block for electoral districts. Census blocks contain population and demographic information necessary to draw fair and balanced districts. The boundaries for the census blocks frequently follow administrative boundaries such as municipal and school boundaries, and physical geographic features such as roads and waterways. Census blocks are used in Wisconsin to build wards. Sec. 5.15(1)(b), Wis. Stats.; 2011 Act 39, Sec. 2. These wards are then combined to form aldermanic, county supervisory, State Assembly, State Senate, and Congressional districts. 2011 Act 39, Secs. 3, 9, 11, 13, 15, 23; 2011 Act 43, Sec. 6; 2011 Act 44, Sec. 2.

The geographic information that results from the census, including census blocks, roads and waterways, municipal and school district boundaries, and other geographic data sets maintained by Census are provided to states in the form of Topologically Integrated Geographic Encoding and Referencing (TIGER) map files. According to the US Census website (www.census.gov), the boundaries shown in the TIGER map files are for Census Bureau statistical data collection and tabulation purposes only; their depiction and designation for statistical purposes does not constitute a determination of jurisdictional authority or rights of ownership or entitlement.

In Wisconsin, the Census TIGER map files and demographic information are loaded into a tool called WISE-LR, which is administered by the Legislative Technology Services Bureau. WISE-LR is then used by Wisconsin counties and municipalities, as well as the State Legislature, to create new districts.

Accuracy of TIGER Data and Census Blocks

After the 2000 Census redistricting effort, there was widespread complaints that the TIGER data from the 2000 census was inaccurate in both geography and administrative boundaries. Specifically, when the TIGER data was overlaid with actual municipal boundaries, road lines, and bodies of water, the TIGER data placed those features in the wrong place. This caused exceptions, such as voters who appeared on the legislative maps to be in one district, but actually live in a different district. This also became apparent during recall elections where addresses that were challenged using the legislative maps were then overturned by G.A.B. based on the information in Statewide Voter Registration System (SVRS).

From information gathered from localities thus far related to the 2010 redistricting, there appears to be consensus that the TIGER data from the 2010 census was more accurate in terms of geography (roads, waterways) than it was in 2000. However, it still contains substantial inaccuracies with administrative boundaries, specifically municipal boundaries and school district boundaries. Municipal boundary inaccuracies are usually due to either projection issues (the correct boundaries appearing in the wrong place), or annexations that were not included in the TIGER 2010 data. According to the 2010 Census TIGER/Line® Shapefiles Technical Documentation, the positional accuracy of the TIGER 2010 data meets a standard of approximately +/- 50 meters (+/- 167 feet). This appears to have been achieved in some cases, but there are other cases where the data is off by more than 50 meters. Even if lines are within 50 meters, that margin of error allows for multiple houses to be placed in the wrong district all along the boundary line. This becomes problematic particularly for municipal boundaries, because many voters can be affected if the Census municipal boundary is 50 meters or more away from its actual location.

Correcting Municipal Boundaries and Wards

Several counties maintain electoral districts such as wards and county supervisory districts in their local Geographic Information Systems (GIS) systems. The local GIS systems tend to be highly accurate, based on survey data for the parcels of land in their county. Many of these counties took the census block based wards and county supervisory districts, and loaded them into their local GIS systems. They then corrected the ward lines to reflect the actual physical municipal boundaries, local geography, and parcel lines. These corrected districts no longer follow the census blocks, and instead follow the more accurate geography and administrative boundaries that actually exist for that county. This is similar to what local clerks have done via their address ranges in SVRS in the past. The address ranges in SVRS reflect the actual municipal boundaries, and are not based on census blocks.

Based on initial analysis, Rock County identified approximately 200 addresses that were placed in the wrong municipality based on the TIGER 2010 data. Rock County provided a specific example of some corrections to municipal boundaries that directly conflict with census blocks and the specific statutory language of Acts 43 and 44, affecting State Assembly, State Senate, and Congressional districts. In this case, the municipal boundary between the Town of Harmony and the City of Janesville was approximately 0.1 mile off (528 feet) in the census data. This caused census blocks containing 9 houses that are in the City of Janesville to be incorrectly placed in the Town of Harmony. In addition, the same error caused census blocks containing one house or farm in the Town of Harmony to be incorrectly placed in the City of Janesville. Based upon the incorrect municipal boundaries, the Town of Harmony even created a separate Ward for these 9 houses. In order to correct this by adjusting the municipal boundaries, Rock County would have to shift census blocks from the Town of Harmony to the City of Janesville (likely negating the need for that Ward in the Town of Harmony), ignoring one entire census block (3004 which is entirely in the wrong municipality) and splitting another census block (3095 which is half in Harmony and half in Janesville). Obviously, this situation also creates the likelihood of a shift in the population for the City of Janesville and Town of Harmony under Act 43, which specifically attributed certain census blocks to incorrect municipalities. Please see the attached map for a visual representation of the discrepancy. This situation is repeated in many other counties, if not all counties.

Districts Created by Acts 43 and 44 and Conflict with Act 39

Because Acts 43 and 44 were passed creating the new State Senate, Assembly, and Congressional districts before municipalities had finished creating their local wards, these districts were built using census blocks. The text of these Acts, now in statute, specifies the district boundaries according to individual census blocks. For the City of Janesville/Town of Harmony example, the statute clearly states that the given Assembly district includes the Town of Harmony census blocks 3004 and 3059. This is problematic for enforcement purposes because those census blocks do not reflect the correct municipal boundaries and the results of implementing these incorrect boundaries in SVRS would place voters on the wrong poll books for each election. After local clerks make these corrections, the districts in SVRS would not match Acts 43 and 44 precisely. In addition, these corrections also require splitting census blocks, which may conflict with Act 39's prohibition on splitting census blocks. Secs. 59.10(2)(a), 59.10(3)(b)1, 62.08(1), Wis. Stats.; 2011 Act 29, Secs. 13, 15, 23.

G.A.B. Redistricting Initiative in SVRS

To update SVRS with the new districts resulting from 2011 Acts 39, 43, and 44, the G.A.B. technical team is importing the new census based wards, county supervisory districts, aldermanic districts (in some cases), State Assembly districts, State Senate districts, Congressional districts, and municipal boundaries from the Legislature, into SVRS.

Due to the inaccuracies of the TIGER 2010 data, some boundary lines will appear in the wrong place in SVRS, which will cause some voters to be assigned to the wrong districts. This will ultimately results in some voters appearing on the wrong poll lists, and potentially being given the wrong ballots. Clerks will be given exception reports that will identify voters who may have been put in the wrong district, and they will be asked to correct them. Therefore, the more accurate the boundary lines are in SVRS, the less manual work clerks need to perform, and the more likely it is that voters appear on the correct poll list and receive the correct ballot. This manual correction process may also conflict with precise compliance with Acts 39, 43, and 44.

Phase 1 of the SVRS updates that are part of the G.A.B. Redistricting Initiative will be available to clerks on December 1st. In Phase 1, clerks will be able to fix addresses that get put in the wrong place on the map. They will also be able to override the district assignment, if it is not assigned correctly (due to boundary line issues). They will not be able to move the boundary lines themselves. If a boundary line is in the wrong place in SVRS, G.A.B. technical staff will need to correct it. The ability to correct boundary lines will be available to clerks in Phase 2 of the SVRS updates after the Spring 2012 elections.

As a result of these issues, the G.A.B. is implementing an action plan to address the educational, administrative, and practical problems for the Spring 2012 elections, particularly if clerks have not completed correcting their exceptions prior to printing poll books. For example, many voters will show up to vote, only to find that they are not on the poll list. When attempting to register voters, an election official may be confused and register them in the wrong location or send them to another incorrect location to register. If a voter is not on the poll list (because they appeared on the wrong poll list) they may be asked to re-register at the polls. Many polling places use street range lists printed from SVRS to determine to which polling place a voter should go. If the boundaries are inaccurate in SVRS, election workers will not have accurate reports at the polling place and could send voters from polling place to polling place. Finally, inaccuracies and confusion regarding correct voting locations are likely to lead to challenges to voter qualifications and disputes in any recount process.

Use of Corrected Wards in SVRS

Approximately 21 counties thus far have asked that we use their corrected wards and/or municipal boundaries in SVRS, rather than the census-based lines we are getting from the Legislature, to ensure that the lines are placed accurately and thus voters show up on the correct poll lists. Because wards are the building blocks for all the other representational districts, if we use the corrected wards, this also corrects the municipal boundaries, county supervisor, aldermanic, State Senate, State Assembly, and Congressional districts. It is not possible to maintain census based legislative districts simultaneously with corrected wards, as the lines would conflict with each other.

Acts 43 and 44 define the State Senate, State Assembly, and Congressional districts at the census block level. The corrected wards and municipal boundaries deviate from the census blocks, therefore using the corrected districts could be interpreted as violating the statute. However, the statute must be violated in practice in order to give a voter the correct ballot. Residents of the City of Janesville cannot be given a Town of Harmony ballot simply because Acts 43 and 44, which were based on Census data, define the districts using inaccurate municipal boundaries.

Plan of Action

It is critical to have the most accurate boundary lines possible in SVRS, in order to assure voters of their correct districts, avoid voter and election official confusion, and to have a manageable workflow for clerks. To reach that goal, the technical team will use the corrected districts wherever it is possible to do so. Regardless of when these corrections occur (pre-Spring 2012 election or after), it is likely that the final districts will not precisely match those prescribed by Acts 43 and 44 because census blocks were attributed to incorrect municipalities. The action plan is as follows:

1. Work with counties that are willing to provide corrected data. They can validate that municipal boundaries and all other ward based districts are corrected accurately when we implement the corrected wards.

2. As part of the deployment of the G.A.B. Redistricting Initiative, Phase 1 SVRS updates, work with local clerks to review their boundary lines BEFORE they start correcting individual voters who were placed in the wrong districts. Any boundary line issues should be reported to the G.A.B. Help Desk so they can be corrected by the technical team.

3. Consult with the Legislative Reference Bureau regarding the use of corrected wards and municipal boundaries in relationship to the State Senate, State Assembly, and Congressional districts which are defined in statute at the census block level.

4. Develop a strategy to address voter and election official confusion regarding misplaced voters in SVRS and to correct information for voters registering on Election Day. In addition, develop a plan to complete corrections following the Spring 2012 election, and to communicate with affected municipalities and counties regarding the May 15, 2012 adjustments.

5. Work with the Legislature to develop legislation that will make necessary technical corrections to Acts 39, 43, and 44 to correct districts to properly reflect actual municipal boundaries rather than being strictly based on census blocks. The simplest way to accomplish this is to make technical corrections to the Acts to refer to the actual wards that comprise the districts, rather than referring to the census blocks.

Conclusion

The G.A.B. will use corrected wards and municipal boundaries at the earliest possible stage of implementing the new districts. The accuracy of the data in SVRS is a critical component to the integrity of the system, voters' confidence in the system, and to the overall administration of every

election. Clerks need effective tools in order to administer elections fairly and correctly, and voters must be assured that they will not be disenfranchised due to redistricting mapping inaccuracies. It is of the utmost importance that the most accurate data be used in SVRS at the earliest possible stage of implementation.

Thank you.

cc: Kevin Kennedy
Director and General Counsel
Government Accountability Board

Brandt, Karen J (15243)

From: ecfmaster@wied.uscourts.gov
Sent: Wednesday, February 22, 2012 8:00 AM
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Subject: Activity in Case 2:11-cv-00562-JPS-DPW-RMD Baldus et al v. Brennan et al Brief (Non-Motion)

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